

<https://helda.helsinki.fi>

With or without private international law : - Critical commentary on the Czech case of recognition of foreign same-sex marriage

Stybnarova, Nicole

2019

Stybnarova , N 2019 , ' With or without private international law : - Critical commentary on
the Czech case of recognition of foreign same-sex marriage ' , Czech yearbook of
international law , vol. 10 (2019) , pp. 435-448 . <
<https://rozkotova.cld.bz/rww/CYIL-vol-10-2019/454/> >

<http://hdl.handle.net/10138/318614>

unspecified

acceptedVersion

Downloaded from Helda, University of Helsinki institutional repository.

This is an electronic reprint of the original article.

This reprint may differ from the original in pagination and typographic detail.

Please cite the original version.

With or without Private International Law – critical commentary on the Czech case of recognition of foreign same-sex marriage

Nicole Štýbnarová

The author of this article is a doctoral candidate in the Erik Castrén Institute of Public International Law and Human Rights at the University of Helsinki. In her research the author focuses on intersections of Migration Law and Private International Law. This article is a result of the author's collaboration in the international research group Young PIL Scholar.

Klíčová slova: mezinárodní právo soukromé, stejnopohlavní manželství, uznávání osobních statusů, veřejný pořádek, právní interpretace

Key words: Private International Law, Same-sex Marriage, Recognition of Personal Status, Public Order, Legal Interpretation

Český abstrakt:

Účelem tohoto článku je přispět k Evropsky aktuálnímu akademickému tématu v rámci mezinárodního práva soukromého zaměřenému na nejasné otázky aplikace norem tohoto právního odvětví v případech uznávání osobních statusů legitimizovaných v zahraničí. Článek se kriticky zabývá přístupem českých soudů k tematice uznávání osobních statusů ve světle nedávného rozhodnutí nejvyššího správního soudu v případě zahraničního stejnopohlavního manželství. Předmětem kritické analýzy tohoto článku je aplikace institutu uznávání správními úřady a následnými soudními instancemi a soulad jimi zvolené metody s doktrínou českého mezinárodního práva soukromého. Za užití metody jazykové interpretace autorka v článku analyzuje právní základ pro výkon tzv. uznávací činnosti zvláštní matrikou, tj. úřadu příslušného k registraci zahraničních manželství, a ukazuje, že právní základy pro výkon a rozsah správní diskrece zvláštní matriky vedou k nejasným závěrům. Nedostatečně odůvodněná interpretace základních norem upravujících rozhodování zvláštní matriky však může vést k tomu, že rozhodování a míra diskrece tohoto správního úřadu mohou být v rozporu se základními principy českého správního práva. Autorka v článku dále analyzuje možné doktrinní nedostatky nejen z hlediska možné míry uznávací činnosti zvláštní matriky, ale i z hlediska v odůvodnění rozhodnutí v meritu věci v předmětném případě. Autorka považuje míru užití norem MPS a jím soudy přisouzenou marginální závažnost ve srovnání s tím, jak soudy v daném případě nakládaly s ustanoveními občanského práva, které byly zvoleny pro argumentaci soudu jako centrální, za problematickou, jelikož základní premisy pro uznávací činnost v přeshraničních statusových otázkách, jakož i právo státu uznání odepřít, jsou zakotveny v mezinárodním právu soukromém. Na základě výše uvedeného článek shrnuje, že uznávací činnost

v případech uznání zahraničních manželství je českými soudy a úřady vykonávána na základě mezinárodního práva soukromého, ale bez jeho užití.

Abstract:

The article contributes to the ongoing European scholarly debate within the field of Private International Law by examining national judicial approaches to challenges to the application of Private International Law norms to recognition of a personal status acquired abroad. It brings a critical perspective on the Czech jurisdictional approach to recognition, in the light of a recent case regarding a doctrinally challenging example of recognition of a same-sex marriage concluded abroad. The critical analysis presented in the article focuses on how Czech administrative bodies and courts applied legal recognition in this case, and the doctrinal compliance of this method from the view of Private International Law. The article uses language interpretation to find that the legal grounds authorizing the Special Civil Registry Office, an administrative body competent to register foreign marriages, are unclear about the scope of administrative discretion this body is entitled to. This lack of clarity can establish non-compliance with the basic principles of Czech Administrative Law. Furthermore, the article identifies doctrinal shortcomings in the adjudication of this case at both the administrative and judicial levels, as the argumentation of the subsequent instances in the given case employs the provisions of Private International Law as marginal arguments, as opposed to arguments based on Civil Law, which it regards as central, while the overall premises for both the recognitive activity and the right to reject recognition are anchored in Private International Law. In this sense, it is concluded that the recognitive activity in the field of marriage recognition in the Czech Republic was in this case exercised on the basis of Private International Law but without Private International Law.

Context:

Recognition of a personal status acquired abroad is an activity which occurs in a situation when the subject of law changes personal status in one state and attempts to register this status in another state. These situations can occur under various circumstances: someone has a citizenship or permanent residence in one state but travels to another state to marry, or temporarily resides in a state in which they have got married and aim to have this marriage and their change of personal status registered in the state of their citizenship (which then becomes the state of the forum). It can also occur when someone has been married and living in one state and now moves to another state with their partner and aims to be regarded as a married person in this state (the forum state). These marriages can be categorised as marriages with an international element, i.e. they include a legal connection to more than one state. For the international element immanent to these marriages, the

conditions allowing them to have effect in both (or several) states concerned are regulated by the provisions of Private International Law (PIL), which is usually defined as a field of law regulating legal relations with an international element¹.

Recognition of a personal status acquired abroad is one topic of PIL currently receiving much attention from European PIL scholars. A particularly puzzling aspect to the recognition of foreign personal statuses arises when the normative requirements for the legal situation causing the change of status differ between the country where the actual change of status occurred and the country where the recognition claim is submitted. In the cases of foreign marriages, a hurdle to the usually smooth recognition process might occur when the country where the marriage was celebrated stipulates different normative aspects or constitutive elements to a marriage as opposed to the country of forum, i.e. the country where the parties to the marriage have applied for recognition of their marriage.

One challenging situation of this kind can be the claim of an applicant residing in a Western European country for recognition of a polygamous marriage which he concluded in a country where these marriages are legal. This challenge to the doctrinal interpretation of PIL connected with a need for balancing of interests in the given cases currently occupies numerous Western European PIL scholars². Against the background of globalisation and rising migration, there is clearly a growing need to understand the cultural and religious aspects of the recognised marriage and their possible accommodation within the national doctrines of PIL. In this context, it is relevant to explore how states in other parts of Europe tackle not only this particular challenge to PIL, but also challenges doctrinally related to this one, to analyse where cultural and religious diversity takes the current doctrine of recognition of a personal status under PIL.

The author of this paper is participating in a European comparative research study mapping national approaches to challenges in recognition of personal status under PIL. This project is particularly focused on recognition as a method, i.e. who recognises, on what legal basis and under which conditions and how is recognition applied in practise. In the Czech context, the most topical challenge to the doctrinal interpretation of recognition is the recognition of same-sex marriages and same-sex parental relations established abroad, as Czech substantive law provides same-sex couples

¹ Further information on recognition under Czech Private International Law can be found e.g. in ONDŘEJ, Jan: *Mezinárodní právo veřejné, soukromé a obchodní*, 3. vydání, Plzeň: Aleš Čeněk, 2009, p. 283 [International Public, Private and Business Law]; KUČERA Zdeněk a spol.: *Mezinárodní právo soukromé*, 8. vydání, Plzeň: Aleš Čeněk, 2015, p. 328 [International Private Law]

² For further information on this issue of recognition of personal status under PIL e.g. TONOLO, Sara: *Religious Values and Conflict of Laws*, *Stato Chiese e pluralism confessionale*, Rivista telematica, n. 7/2016, February 22, 2016; JÄNTERÄ-JAREBORG, Maarit: *Cross-border Family Cass and Religious Diversity: What can judges do?*, In: *Family, Religion and Law: Cultural Encounters in Europe* / [ed] Prakash Shah, Marie-Claire Foblets, Mathias Rohe, Surrey: Ashgate, 2014, pp. 143-163; VERHELLEN, Jinske: *Cross-Border Portability of Refugees' Personal Status*, *Journal of Refugee Studies*, Oxford University Press, Volume 31, Issue 4, 1 December 2018, pp. 427–443

with limited options in this direction and these couples started to bring their actions in front of the Czech courts more frequently. Judicially decided cases of this kind include cases no. 8 As 230/2017-41 (on the level of the Supreme Administrative Court) concerning a same-sex marriage concluded abroad, case no. 5 A 186/2012 – 61 (on the level of Municipal Court of Prague) concerning a same-sex couple's foreign adoption, case no. I. ÚS 3226/16 (on the level of Constitutional Court) concerning a same-sex couple's parental status on the basis of surrogacy agreements concluded abroad.

In the course of reporting on case no. 8 As 230/2017-41, regarding foreign same-sex marriage and the recognitive process conducted in this case, the margin of the recognitive activity regarding cases of foreign marriages at the initial level of administrative authority turned out to be unclearly regulated by law. Additionally, the argumentation of the courts on the subsequent judicial level proved to be undoctinal, somehow disregarding the very premises that this activity is based on – the provisions of PIL. This article does not aim to discuss the outcome of the case of recognition of personal status based on foreign same-sex marriage from the perspective of values but focuses on the recognitive activity instead. The view presented through this text aims to be critical, based on different interpretation of doctrinal premises for recognitive activity stemming from legal sources and the evaluation of application and obedience of basic principles of Czech Administrative Law.

Applicable law regulating recognition of foreign personal status

Foreign marriages are recognised in the Czech Republic on the basis of the provisions of the Act on Private International Law, no. 91/2012 Coll. (Act on PIL), which stipulates the so-called collision norms for determination of the law applicable to the relation at stake. The conflict of law norms on foreign marriage in § 48 of the Act on PIL provide determination of the law applicable to conclusion of the marriage, particularly determining the rules applicable to the eligible persons and a form of conclusion of the marriage. The categorisation of this legal issue under the field of PIL is similar to those in other European countries, as the very idea that marriage conducted abroad can under certain conditions have effects in a forum state was formed within the field of Private International Law. Marriage concluded abroad is thus recognised in the Czech Republic, in the meaning of having admitted effects in the forum state, if the provisions of § 48 of the Act on PIL are met, i.e. the parties to marriage and the form of conclusion of marriage comply with the rules of the state of celebration of marriage. This provision embodies the principle of *lex loci celebrationis* and presents a reason for why marriages concluded abroad do not have to be re-entered in the Czech Republic in order to have effect.

The existence of a foreign marriage is documented by a foreign marriage certificate issued by a competent foreign authority. The effect of this marriage certificate is admitted through its recognition as an official document under § 12 of the Act on PIL. This provision states that a public document issued by a court, notary or public authority abroad, which in this state bears the effects of a public document [...], has a proving effect of a public document accordingly in the Czech Republic, if it is verified in a due manner. The Act on PIL in further provisions³ lays down which foreign authoritative decisions or official documents must be recognised through a special decision of Czech courts – marriage certificates are not to be included among these⁴. It does not stipulate which body is competent to decide on recognition of foreign official documents in the remaining cases falling under the scope of § 12 of the Act on PIL. All these rules on recognition are limited with one reservation, which is the public order reservation. Foreign official documents or decisions can be denied recognition if the effects of recognition or the recognition itself would be contrary to public order in the Czech Republic⁵.

The Act on Civil Registry, Name and Surname and on Change of Some Related Acts, no. 301/2000 Coll. (Act on Civil Registry) states in its § 42 that marriages of Czech citizens concluded abroad will be registered in the Czech Civil Registry via a specific authority – the Special Civil Registry Office (in Czech: *Zvláštní matrika v Brně*). § 43 of the Act on Civil Registry then enumerates the conditions to be met in order for the Special Civil Registry Office to register the foreign marriage. In the field of recognition of foreign marriages, the provisions of the Act on Civil Registry can be seen as implementing the provisions of the Act on PIL. This is not stated explicitly in any of the Acts, but such a connection can be induced from the following. The purpose of the existence of the Special Civil Registry Office is to register (among other things) foreign marriages in the Czech Civil Registry⁶. Such registration leads to declaration of legal effects of the marriage in the Czech Republic, i.e. de facto means recognition of the marriage by Czech public authorities. The premise that foreign marriages can be recognised in the Czech Republic is rooted in the Act on PIL. The Act on PIL does not empower any other authority with the competence to grant recognition in cases of foreign marriages and, in practice, the gateway for foreign marriages' effectivity in the Czech Republic is via the Special Civil Registry Office. Therefore, even though the Act on PIL uses the term “recognise”, in provisions stating the conditions for recognition of foreign marriages, while the Act on Civil Registry uses the term “register”, in provisions stating the conditions for registering foreign marriage,

³ Provision of § 14 of the Act on PIL

⁴ BŘÍZA, BŘICHÁČEK, FIŠEROVÁ, HORÁK, PTÁČEK, SVOBODA. Zákon o mezinárodním právu soukromém. Komentář, C.H.Beck, 2014, § 14 [The Act on Private International Law]

⁵ Provision of § 4 of the Act on PIL

⁶ Provision of § 3(4) of the Act on Civil Registry

it is to be understood that the Act on Civil Registry implements the Act on PIL as regards recognizing foreign marriages. The language inconsistency adds to the confusion establishing the conditions and competence of the Special Civil Registry to conduct the discretionary recognitive activity in cases of foreign marriages (as will be demonstrated below).

For cases in which the normative aspects of marriage are similar to those prescribed by Czech law, only limited recognitive activity is required by the Special Civil Registry Office as part of the registration. In these cases, the Special Civil Registry Office examines if the conditions for foreign marriage registration, as set down by the Act on Civil Registry, have been met. These conditions concern merely the person entitled to apply for marriage registration and the required aspects of foreign official documentation proving the existence of marriage, including the required verification of this documentation. If these conditions of the Act on Civil Registry are met, the Special Civil Registry decides on the basis of the Act on Civil Registry that marriage is registered and issues a Czech marriage certificate, which serves as a public document proving the existence of marriage in proceedings before Czech public authorities. By this, the marriage is *de facto* recognised as presumed by the Act on PIL. The term “limited recognitive activity”, which the article claims is conducted in these cases (that in practice form the vast majority of all foreign marriage cases) is used to imply that the Special Civil Registry Office does not need to employ its administrative discretion, beyond the formal aspects of the proceeding, in order to take a decision. For the discretion regarding the documentation, the Act on Civil Registry remembers on potential unclarities regarding the documents proving the existence of a foreign marriage and empowers the Special Civil Registry Office to act in order to eliminate its suspicions in such cases⁷. Such a case might be e.g. when a foreign marriage certificate is presented, including verification with apostille, but the Civil Registry is unsure whether the issuing authority really had the right to issue a marriage certificate according to the applicable foreign law (because it is e.g. an unusual authority). In these cases, the Special Civil Registry Office has the right to ask e.g. the Czech diplomatic mission in the given state for assistance in confirming the competence of the authority in question.

The Act on Civil Registry does not state this explicitly; however, it can be understood by interpreting the Act on Civil Registry through argument *a contrario*: in a case when the formal requirements are not fulfilled, the application for registration of a foreign marriage can be rejected. It is clear from the Act that the Special Civil Registry has the right to refuse registration of a foreign marriage; it is, however, unclear for what reasons the application for registration can be declined⁸.

⁷ Provision of § 42 of the Act on Civil Registry

⁸ Provision of § 87 of the Act on Civil Registry

The author argues that rejection of registration on the basis of non-fulfilment of the formal requirements stipulated in this law stems from the core of the language interpretation of the given Act, while other reasons are located more or less on the penumbra of possible legal interpretation⁹.

The question that the author aims to examine is what happens when the Special Civil Registry comes across a case like the one central to this article. The initial application for a registration of a foreign marriage in this case was received by the Special Civil Registry, fulfilling all the formal requirements as outlined above. The normative aspects of the foreign marriage however did not comply with the normative aspects of a marriage under the substantive law of the Czech Republic. The difference consisted in the fact that Dutch law, under which the marriage was concluded, allows marriage of two people of the same sex, while the Czech Civil Code only allows marriage of a heterosexual couple¹⁰.

Administrative decision-making in the given case

As implied above, the Act on Civil Registry is silent on the matter of the reasons for the Special Civil Registry Office to reject the application. The author argues that rejection on the grounds of formal reasons can be derived from the Act, unlike a rejection for substantive reasons.

However, as the Special Civil Registry is implicitly understood to be the body carrying out de facto recognition of foreign marriages in the Czech Republic, it might be possible to use systematic interpretation of the relevant provisions and interpret the Act on Civil Registry in the light of the Act on PIL and argue that the Act on PIL is *lex generalis* to the Act on Civil Registry. In the Act on PIL, we find on a general level the public order reservation that allows the recognising body to reject the application of foreign law in cases where foreign law would normally be applied¹¹. The public order exception is an open concept, which can be interpreted widely or narrowly. The scholarly commentary to the Act on PIL argues that this exception should be applied in situations where the effects of foreign law would be absolutely unacceptable for Czech society and the Czech legal order¹².

In the following paragraphs, the article will introduce the actual argumentation of the administrative and judicial bodies in the given case. The Special Civil Registry Office, as the first administrative instance deciding in the case, rejected the application for registration of a foreign same-sex marriage. The reasons provided in the argumentation of the decision were that on the basis

⁹ I borrow this division on the core and penumbra of a legal provision from the famous article of HART, H.L.A., Positivism and the Separation of Law and Morals, Harvard Law Review, Vol. 71, No. 4 (Feb., 1958), pp. 593-629

¹⁰ Provision of § 655 of Civil Code, Act no. 87/2012 Coll.

¹¹ Provision of § 4 of the Act on PIL

¹² DOBIÁŠ, Petr. Zákon o mezinárodním právu soukromém: Komentář, Nakladatelství Leges, 2014, § 4 [The Act on Private International Law: Commentary]

of § 87 of the Act on Civil Registry¹³, the Special Civil Registry Office rejected the application due to § 42 of the Act on Civil Registry in conjunction with § 655 of the Civil Code. The Special Civil Registry Office argued that the term “marriage” under the Act on Civil Registry must be, due to the systematic interpretation of the whole Act, understood as a different union than registered partnership – simply because the Act uses both terms, and thus there must be a difference between them. For definition of these terms, the Special Civil Registry Office then used the provisions of Czech substantive law, the Act on Registered partnership and the Civil Code.

The second administrative instance reviewing the decision of the Special Civil Registry Office was the Brno City Council (in Czech: *Magistrát města Brna*). The appeal stated that the applicant fulfilled all requirements posed by the applicable law for registration of a marriage and the rejection of the application was contrary to the applicable legal provisions. The appellate claimed that the terminology of the Act on Civil Registry, using the different terms “marriage” and “registered partnership”, should be understood in the light of the preparatory works and thus seen as creating difference on the basis of different rights and duties legally associated with the unions, rather than on the basis of the sexes of the spouses.

The City Council stated in the decision that the Special Civil Registry Office had (legally) evaluated the factual circumstances as part of its administrative discretion¹⁴. The City Council agreed with the evaluation conducted by the Special Civil Registry Office on the basis of systematic interpretation of the applicable acts. The systematic interpretation consisted of the following: § 655 of Civil Code defines marriage as a union of a man and a woman; the Act on Civil Registry states that marriages are registered in the marriage registry, where information such as [...] of the man and woman enclosing the marriage is included¹⁵; the body further argued that from the view of historical development, function and cultural understanding, marriage is clearly to be understood as a union of man and woman. Registered partnership, on the other hand, as defined in § 1(1) of the Act on Registered Partnership, is the union of two persons of the same sex; the Act on Civil Registry states that registered partnerships are registered in the registry of registered partnerships, where information such as [...] of the partners enclosing the registered partnership is included¹⁶; registered partnership was brought into the Czech legal order in 2006 to allow same-sex couples to institutionalise their cohabitation. The Czech legislation, however, distinguishes between these two relations and does not

¹³ Provision of § 87 of the Act on Civil Registry, is a general provision providing the Special Civil Registry Office with the right to reject an application, without stipulating its reasons for doing so.

¹⁴ Decision of the Brno City Council, no. MMB/0217029/2015, p. 4

¹⁵ Provision of § 20(1) of the Act on Civil Registry

¹⁶ Provision of § 20a of the Act on Civil Registry

treat them equally¹⁷. The argumentation further states that the Special Civil Registry Office is in its activity bound by the legal order of the Czech Republic and is allowed to act only within the legal limits: with this in mind, the refusal to register a foreign same-sex marriage as a marriage is seen as an obligatory action¹⁸.

Both of the administrative decisions lack any explanation of the assumption that they are entitled to administrative discretion, consisting of legal evaluation of the normative circumstances. Furthermore, none of the authorities acknowledged that the fundamental reason why they can consider rejection of a registration of a foreign marriage for substantive reasons is the PIL provision for public order. They also did not explain or apply the relevant provisions of the Act on PIL answering to why the foreign union at stake should be normatively characterized under the provisions of Czech law. The following instances reviewing this decision were two judicial instances, in which doctrinal awareness could be expected to be higher.

Judicial decision-making in the given case

The first judicial instance to review the decision of the Special Civil Registry was the Regional Court in Brno, which found the claim unfounded¹⁹. The court focused on the distinction between marriage and registered partnership. As the spouses required the foreign marriage to be registered as a marriage, and thus registered in the marriage registry, their application could not be complied with as the Act on Civil Registry states that “the marriage registry includes information such as [...] of the man and woman enclosing the marriage”²⁰. The court argued that the term marriage is necessarily interpreted according to Czech law (without applying the relevant provisions of the Act on PIL). When the court examined the applicable provisions of the Act on PIL, it stated that from the provisions of the Act in conjunction with the provisions of the Act on Civil Registry, it was unclear how much of a recognitive activity the Civil Registry Office could conduct while registering foreign marriages and assessing foreign marriage certificates. The court believed that the Civil Registry Office, however, was authorised to do so and supported this argument with reference to two sources: internal information n. 4/2011 of the Ministry of Interior, from 20.1.2011 no. MV-5047-30/vs-2010 regarding recognition of foreign adoptions by unmarried couples; and an academic article²¹. Additionally, the court stated that while the administrative authorities draw their argumentation on rejection of the application from the interpretation of the term “marriage” (which the court states as

¹⁷ Decision of the Brno City Council, no. MMB/0217029/2015, p. 5

¹⁸ Ibid. p. 6

¹⁹ Decision no. 29 a 122/2015 - 34

²⁰ Supra note 12

²¹ BĚLOHLÁVEK, A. Uzavírání sňatků v zahraničí, Právní rádce, 2006, no. 7 [Conducting Marriages Abroad]

rightful), the provisions of PIL were also relevant. Here the court referred to two legal commentaries to the Act on PIL²², which point to different conclusions regarding possible registration of a foreign same-sex marriage, while one of them is found internally inconsistent. In its analysis of PIL provisions, the court for the first time in the proceedings mentioned the public order reservation²³ and dedicated extensive analysis to the interference of foreign same-sex marriage with the public order in the Czech Republic.

The court thus corrected one of the doctrinal insufficiencies of the preceding decisions taken before administrative bodies. However, the court ventured into a field of strong doctrinal violation while interpreting the ability of the Civil Registry Office to conduct recognitive activity. In founding the interpretation of the ability of the Civil Registry Office to perform any kind of activity on a source outside of statutory sources, the court found itself interfering with the basic principles of Czech Administrative Law. The first paragraphs of the Act on Administrative Proceeding, no. 500/2004 Coll., stipulate the basic postulates of the functioning of public administration²⁴. Some of the basic postulates are the principle of legality²⁵ and the principle of restricted discretion, i.e. the exercise of jurisdiction in accordance with the purpose for which it was legally entrusted and within the limits set forth by law²⁶ (in Czech: *zásada enumerativnosti veřejnoprávních pretentzí*). The discretionary power of the public administration is limited by these principles²⁷. Thus, the administrative body employing administrative discretion cannot exceed the legal limits applied to the discretion on a statutory basis, either on a basis of a special statute or on the basis of other provisions of the Act on Administrative Proceeding²⁸. Accordingly, should there be an understanding that an administrative body is entitled to discretion or any such kind of mental activity – i.e. recognitive activity – this understanding should be based on interpretation of statutory law. According to the Czech scholarship on Administrative Law, administrative discretion must be established by statutory law and must be seen as a limited discretion, within the limits set forth by law²⁹. Establishing the interpretation on a

²² PAUKNEROVÁ, M., ROZEHNALOVÁ, N., ZAVADILOVÁ, M., a kolektiv. Zákon o mezinárodním právu soukromém – Komentář, Wolters Kluwer, 2013 [The Act on Private International Law - Commentary]; BŘÍZA, and co.. Zákon o mezinárodním právu soukromém. Komentář, C.H.Beck, 2014 [The Act on Private International Law: Commentary]

²³ Decision no. 29 a 122/2015 – 34, § 30

²⁴ HRABÁK Jan, NAHODIL Tomáš. Správní řád s výkladovými poznámkami a vybranou judikaturou, Wolters Kluwer ČR, a. s., 4. vydání, 2012, § 2 [The Act on Administrative Proceeding with Interpretative Notes and Selected Case-law]

²⁵ Provision of § 2(1) of the Act on Administrative Proceeding

²⁶ Provision of § 2(2) of the Act on Administrative Proceeding

²⁷ STAŠA, J, TOMÁŠEK, M. Codification of Administrative Procedure, in The Lawyer Quarterly 2/2012, p. 67

²⁸ JEMELKA, PONDĚLÍČKOVÁ, BOHADLO. Správní řád, C. H. Beck, 5th edition, 2016, p. 21-32 [The Act on Administrative Proceedings]

²⁹ SLÁDEČEK, V., Obecné správní právo, Prague: Wolters Kluwer ČR, 3rd edition, 2013, pp. 152 [General Administrative Law]

scientific article and analogical application of by-laws thus grossly violated the basic principles of public administration in the Czech Republic.

The last deciding instance of the judicial order reviewing the matter took place before the Supreme Administrative Court. The court did not discuss the first instance court's argumentation for the Special Civil Registry Office's competence to conduct recognitive activity, it merely reaccepted part of the argumentation on this matter³⁰. Furthermore, it approved the Regional Court's argumentation on subsuming of recognition of a foreign same-sex marriage under the scope of public order. In its argumentation, it stated, "the Regional Court did not make a mistake, when arguing with the scope of public order in adjudicating the case [...]. Arguing public order exception in the adjudicated matter supported the reasons for concluding that the application cannot be complied with [...], even though application of this exception was not the central reason for rejecting the application".

Critical commentary to the administrative and judicial argumentation

Eventually, through the argumentation of the administrative and judicial instances, the registration of the marriage was rejected. Initially, at the administrative level, the reasons for the rejection were that the normative aspects of the marriage corresponded with the normative aspects of registered partnership under Czech law, and thus the marriage could not be registered as a marriage in the Czech Civil Registry. Simply put, Czech law understands something else by the term marriage than Dutch law. Additionally, the judicial instances added the consideration of public order to the argumentation and argued that not only was the given Dutch marriage actually a registered partnership under Czech law, but also registration of a same-sex marriage as a marriage in the Czech Civil registry would interfere with public order in the Czech Republic.

As a first point of the critique, the author would like to briefly analyse the substantive outcome of the adjudication. The author first disclaims that rejecting the application for registration of a foreign same-sex marriage was a value choice and not the necessary outcome of applying and interpreting the law. The adjudicated case is an example of a "hard case", in which statutes are vague in their connection to the situation in reality and must be actively interpreted before they can be applied to new cases³¹. Accordingly, while interpreting, each judge's interpretative theories are grounded in their own convictions about the "point" of the statute, i.e. the justifying legal purpose or principle³².

³⁰ Decision of Supreme Administrative Court no. 8 As 230/2017-41, § 19

³¹ DWORKIN, R. *Taking Rights Seriously*. Harvard University Press, 1997 (revised edition from 1978), pp. 81-83; HART, H.L.A., *Positivism and the Separation of Law and Morals*, Harvard Law Review, Vol. 71, No. 4 (Feb., 1958), pp. 607

³² DWORKIN, R. *Law's Empire*, Cambridge, Mass: Belknap Press, 1986, pp. 87

Finding the purpose of the statute (in this case the Act on Civil Registry) through applying what the judge believes are interpretative principles or legal traditions consists of choosing particular applicable provisions and excluding other statutes or provisions. The choice between the principles and statutes to be applied and their interpretation is a value choice based on the ideologically-oriented work of the judge³³.

To support the application of the critical theories of adjudication to this particular case, the author further outlines points where an alternative interpretation could have been chosen through an equally plausible legal reasoning process. One of these points is the analysis of the normative compliance of foreign and Czech versions of marriage. The sex of the spouses is one normative aspect, where the Dutch notion of marriage differs from the Czech normative notion of marriage, and the adjudicating bodies decided to follow this aspect as decisive. An alternative normative aspect, which could have been determined to be decisive, would be the rights and duties connected with marriage, which might be similar under the Czech and the Dutch normative notion of marriage (and accordingly, different from the notion of registered partnership) and which would then point to registering the foreign marriage as a marriage. Furthermore, the language interpretation of the Act on Civil Registry was used by the adjudicating bodies to argue that marriage and registered partnership are different unions under this law, essentially differentiated from each other on the basis of the composition of the sexes of parties to the unions. The linguistic interpretation of the Act on Civil Registry could have also been conducted by distinguishing between the terms “marriage” and “marriage conducted abroad”, which would establish a distinction on the basis of the place of celebration of marriage³⁴. The argument for impossibility to register foreign same-sex marriage under the Act on Civil Registry based on the linguistic interpretation of the Act was that marriages are registered in the register of marriage, while registered partnerships are registered in the register of registered partnerships³⁵. Contrarily, based on the alternative linguistic interpretation of the Act on Civil Registry, it could be argued that the notion of foreign marriage is necessarily distinguished from the notion of domestic marriage, because foreign marriages are registered via the Special Civil Registry, while domestic marriages are registered via ordinary Civil Registry³⁶. The decision to apply the public order reservation at all is also a value choice as the Supreme Administrative Court itself noted: “...a same-sex marriage does not necessarily have to be obviously included under the scope

³³ KENNEDY, D. Critique of adjudication: fin de siècle, Harvard University Press paperback edition, 1998, pp. 177

³⁴ As the language use of the law clearly distinguishes between these two types of marriages as well, e.g. in § 1(1)a) and § 1(1)b)

³⁵ Compare § 20 and § 20a of the Act on Civil Registry as argued by the Brno City Council in the decision no. MMB/0217029/2015

³⁶ Provision of § 3(5) of the Act on Civil Registry

of public order from the first sight [...]”. Thus, it is clear that the judicial bodies found same-sex marriages located within a penumbra of the notion of public order and thus needed to develop a chaining argumentation to legitimise the inclusion of this union under the scope of public order.

The policy argument is transparent in the part where the adjudicating court introduces the application of public order reservation. The Act on PIL, in enacting the public order reservation, invites the judge to consider non-deductive reasons for choosing one applicable law or another³⁷. Indeed, the reasons introduced for activating the public order reservation are non-deductive. The Regional Court notes that same-sex marriage is not to be included under the term of public order at first sight, but its connection with this term is made due to the traditional understanding of the institute of marriage as between man and woman³⁸. The Regional Court refers to previous case-law of the Supreme Administrative Court, which lists the principle of monogamy and the best interest of the child as exemplary principles from the field of Family Law establishing the scope of public order. It adds that these are to be included because they are steady and unchanging norms, which have not been subject to amendments, and constitute pillars of the system at the base of Family Law³⁹. The Regional Court then refers to the history of marriage in the Czech Republic to explain why marriage as a union of opposite sexes should be added to those principles⁴⁰.

The author thus does not see non-recognition of the marriage as an inevitable outcome of the decision but rather as a value choice of the administrative and judicial decision-making bodies, which is not to be condemned through this article as it is an immanent part of every “hard case” adjudication. The outline of how the legal sources could have been applied differently to this case can be seen as an example supporting the argument of the preceding part. From how the law could have been applied differently with approaching the interpretation of meaning with different ideology, the critique now shifts to how the law should have been applied differently according to the deductive order of interpretation of legal sources.

The doctrinal wanting

Despite the fact that all of the decision-making in the case has been based on the premises of Private International Law, the administrative bodies and courts apply this field of law as a marginal perspective of a supportive role. The administrative bodies deciding in the case treat the Act on Civil Registry in conjunction with the Civil Code as primary sources of their adjudication. The Act on Civil Registry does not provide reasons for rejecting an application, those can be argued solely by

³⁷ KENNEDY, D. Critique of adjudication: fin de siècle, Harvard University Press paperback edition, 1998, pp. 99

³⁸ Decision no. 29 a 122/2015 – 34, § 34

³⁹ Ibid.

⁴⁰ Ibid. § 35

interpretation *a contrario* on the basis of non-compliance with the formal requirements of the proceeding. The provision of § 87 of the Act on Civil Registry was used to argue that the Special Civil Registry Office is allowed to reject a claim, while the provision of § 655 of the Civil Code has been used to argue the reasons for such rejection. Without proper argumentation using the provisions of the Act on PIL, it seems that any marriage normatively noncompliant with the Czech substantive law could be denied recognition in the Czech Republic, which presumption would go entirely against the meaning and essence of PIL. The argumentation lacked a reason to apply Czech law for qualifying the marriage as a non-marriage for the purpose of searching for applicable law within the provisions of the Act on PIL. To argue the choice of application of Czech law to the question of qualification the administrative bodies and the courts would need to argue and interpret § 20 of the Act on PIL (Qualification), which none of them did.

Additionally, the only reason to reject an application for registration of foreign marriage for the substantive reasons under the applicable law is to activate the public order exception under § 4 of the Act on PIL. Instead, the consideration for public order exception was first introduced to the adjudication in the first instance of the judicial assessment, when the Regional Court stated that public order is a factor not explicitly mentioned but implicitly connected to the findings of the administrative bodies. Accordingly, the Supreme Administrative Court states that, “The Regional Court [...] explained why it understands marriage as a union of man and woman, as was stated above, and for that reason it also needed to consider the applicability of public order reservation in the given case”. Additionally, it stated, “The Regional Court did not make a mistake when, while assessing the given question (of normative aspects of marriage), it considered the scope of public order”.

Thus, instead of applying the public order exception to the applicable conflict rules and arguing why it needed to be applied, the adjudicative authorities went the other way around. Identifying factors embedded in substantive law, morals and policy reasons and eventually considering that those factors could amount to the public order exception is doctrinally wrong and points to the fact that in the adjudication, the public order reservation was considered a supporting reason for rejecting the application, located at the margins of the argumentation. The fact that the courts did not identify the reasons for rejection as entirely overlapping with the term of public order shows that there was not such a strong conviction about the applicability of public order exception behind the adjudication. It shows that the application was not rejected because it would interfere with the public order in the state, but primarily for other reasons, and only secondarily for reasons of public order. In rejecting an application of foreign law under the rules of PIL, the interference with public order must be striking precisely because it is the only reason for not applying foreign law in spite of the dictum of the connecting factors stipulated in the Act on PIL. It shows that the administrative and

judicial instances were not entirely aware of the doctrine that they were applying (which perhaps points to the above thesis on the high amount of policy and the lesser amount of doctrinal deduction in the given adjudication). The argumentation seems more focused on why marriage is necessarily a union of man and women under the dictum of Czech substantive law, than why this particular constellation (allegedly) immanent to marriage is part of the public order. Additionally, only and primarily on the basis of an established connection between public order in the forum state and the invasive nature of the given union can the claim for registration (recognition) be rejected.

A final point, but yet again a point of crucial importance to the plausibility of the court argumentation in this case, is the question of the capacity of the Special Civil Registry Office to conduct recognitive activity. The ability to conduct recognitive activity, consisting in assessing the compliance of the effects of recognition of foreign public document and foreign matrimonial union with the substantive law of the forum state, does not stem clearly and explicitly from the applicable statutory law. Additionally, the doctrine of administrative discretion in the Czech Administrative Law points to a primarily restrictive approach, essentially allowing administrative discretion only for the purposes set forth by law and within the limits set forth by law⁴¹. Thus, an extensive interpretative activity from the court to establish the competence of the Special Civil Registry would be required at this point. Exemplarily, the court could have used the provisions of § 2 of the Act on Administrative Procedure, stating that decisions of administrative bodies must be conducted in accordance with statutory law. The court could argue that decision on registration of a foreign same-sex marriage would have been against this provision, thus the Special Civil Registry Office could not have acted differently. The argumentation with acting in accordance with statutory law could have, however, been used to reach the opposite outcome as well (as outlined above). Instead, the Regional Court based establishment of the competence of the Special Civil Registry on an internal memo of the Ministry of Interior and a scientific article, which, as argued above, grossly interferes with the basic principles of Czech administrative law. Interestingly, the Supreme Administrative Court, i.e. the highest authority to adjudicate cases regarding application of Czech administrative law, did not correct this non-doctrinal reasoning of the Regional Court. This aspect might point to the fact that policy outweighed legal doctrine in this adjudication.

Conclusions

The article aimed to comment on an important case in the field of Private International Law adjudicated in the Czech Republic in 2018. The importance of this case consisted in the fact that it was the first case dealing with recognition of foreign matrimonial union of different normative

⁴¹ POTĚŠIL. a kol., *Správní řád*, 1. vydání, C.H. Beck, 2016, p. 32-49 [The Act on Administrative Proceedings]

qualities than are the normative qualities of a marriage under Czech substantive law. It was decided at the level of the Supreme Administrative Court, which gives the adjudication authority in guiding the adjudication of lower courts and administrative bodies in future cases of the same or similar nature. The case deserves attention in the light of the rising focus of European scholars on application of PIL among EU member states in cases of cross-border status recognition. With the expanding migration among EU states, but also from third states to the EU, the member states have the opportunity to define how they wish to apply PIL to these novel culturally challenging cases. It can be expected that similar cases will become more frequent in the future. The opportunity to broaden or narrow the doctrine of recognition under PIL in the hands of the national courts lies precisely in the adjudication of novel cases like the given case.

The fact that migration volume is rising and novel cases like the given case are emerging more frequently does not imply that states have to be open to new forms of family unions and to apply foreign law more willingly. Approaches of national legal protectionism, evolved from primary consideration to provisions of substantive law of the forum, are just as legitimate as liberal, individual rights-oriented approaches to application of foreign law under the PIL field. However, what novel cases require and what the national PIL doctrine offers instruments for, is an approach of adjudication aware of the fact that what is being done is broadening or narrowing the existing PIL doctrine. This approach should consider the existing doctrine and try to interpret the applicable law with consideration of the basic principles of the doctrine and with an attempt to interpret those deductively. Novel cases are usually more exposed to judicial discretion and thus application of extra-legal informants, as the deductive legal reasoning might not provide unambiguous or convincing outcomes. The given case included some policy arguments but remained wanting in defining the doctrinal base, limits and principles. Given that the present adjudication will have authoritative power over future cases, in fact as much authoritative power as the continental legal system allows (except for possible adjudication of Constitutional Court), it can be seen as a missed opportunity by the Supreme Administrative Court to develop a convincing doctrinal argumentation to redefine the limits of national PIL and the conditions of its application by the administrative bodies. This is even more true considering that, even though the core of the case lied within the field of Private International Law, the court used very little of what this field offers to develop argumentation for restrictive use of its instruments.

It remains to summarise that the reason why we can even think of the possibility of foreign marriage having legal effects in the Czech Republic is given to us by Private International Law. The same is true for the possibility of denying an effect to a foreign marriage in the Czech Republic. However, the argumentation for denying the effects was developed without the principles that Private

International Law offers for rejecting the effectiveness of such marriage. In simple words, the author concludes that adjudication to this case was established on the basis of Private International Law but carried without Private International Law.

Bibliography:

BĚLOHLÁVEK, A. Uzavírání sňatků v zahraničí, Právní rádce, 2006, no. 7

BŘÍZA, BŘICHÁČEK, FIŠEROVÁ, HORÁK, PTÁČEK, SVOBODA. Zákon o mezinárodním právu soukromém. Komentář, C.H.Beck, 2014

DOBIÁŠ, Petr. Zákon o mezinárodním právu soukromém: Komentář, Nakladatelství Leges, 2014
DWORKIN, R. Taking Rights Seriously. Harvard University Press, 1997 (revised edition from 1978)

DWORKIN, R. Law's Empire, Cambridge, Mass: Belknap Press, 1986

JEMELKA, PONĎELÍČKOVÁ, BOHADLO. Správní řád, C. H. Beck, 5th edition, 2016

KENNEDY, D. Critique of adjudication: fin de siècle, Harvard University Press paperback edition, 1998

HART, H.L.A., Positivism and the Separation of Law and Morals, Harvard Law Review, Vol. 71, No. 4 (Feb., 1958)

HRABÁK Jan, NAHODIL Tomáš. Správní řád s výkladovými poznámkami a vybranou judikaturou, Wolters Kluwer ČR, a. s., 4. vydání, 2012

JÄNTERÄ-JAREBORG, Maarit: Cross-border Family Cass and Religious Diversity: What can judges do?, In: Family, Religion and Law: Cultural Encounters in Europe / [ed] Prakash Shah, Marie-Claire Foblets, Mathias Rohe, Surrey: Ashgate, 2014

ONDŘEJ, Jan: Mezinárodní právo veřejné, soukromé a obchodní, 3. vydání, Plzeň: Aleš Čeněk, 2009

PAUKNEROVÁ, M., ROZEHNALOVÁ, N., ZAVADILOVÁ, M., a kolektiv. Zákon o mezinárodním právu soukromém – Komentář, Wolters Kluwer, 2013

POTĚŠIL. a kol., Správní řád, 1. vydání, C.H. Beck, 2016, p. 32-49

SLÁDEČEK, V., Obecné správní právo, Prague: Wolters Kluwer ČR, 3rd edition, 2013

STAŠA, J, TOMÁŠEK, M. Codification of Administrative Procedure, in The Lawyer Quarterly 2/2012

TONOLO, Sara: Religious Values and Conflict of Laws, Stato Chiese e pluralism confessionale, Rivista telematica, n. 7/2016, February 22, 2016

VERHELLEN, Jinske: Cross-Border Portability of Refugees` Personal Status, Journal of Refugee Studies, Oxford University Press, Volume 31, Issue 4, 1 December 2018

Case-law and statutory sources:

Act on Civil Registry, Name and Surname and on Change of Some Related Acts, no. 301/2000 Coll.

Case no. 8 As 230/2017-41, Supreme Administrative Court

Case no. 5 A 186/2012 – 61, Municipal Court of Prague

Case no. I. ÚS 3226/16, Constitutional Court

Act on Private International Law, no. 91/2012 Coll.

Act on Administrative Proceeding, no. 500/2004 Coll.